United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1201

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1201

UNITED STATES OF AMERICA,

Appellant,

—v.—

FRANK S. CANNONE, STANLEY A. RAPPUCCI, THOMAS A. GAETANI, JON N. ENGLISH, JOSEPH N. MARUCA, VINCENT N. CHRISTINA, ANTHONY R. SANTACROSE, JR., RAYMOND D. MASCIARELLI, JAMES W. MCGRATH, ANDREW J. QUINLAN and THOMAS A. ABBADESSA,

Appellees,

—*and*—

UNITED STATES OF AMERICA,

Appellant,

— v. —

RAYMOND D. MASCIARELLI and LAWRENCE SCHULTZ,

Appellees.

PETITION BY THE UNITED STATES OF AMERICA FOR REHEARING AND SUGGESTION FOR REHEARING *IN BANC*

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Preliminary Statement

The United States respectfully petitions for rehearing, and suggests rehearing *in banc*, of the opinion of a panel of this Court (Smith, Hays, and Meskill, C.JJ.), filed

September 26, 1975, reversing an order of the United States District Court for the Northern District of New York requiring pretrial disclosure of the names and addresses of all Government witnesses to be called at trial and excluding the testimony of any Government witness not so identified.

Reasons For This Petition

The Government appealed the order of the District Court in this case, and the panel has reversed it. The Government might thus be thought to have prevailed on this appeal, but its victory is a hollow one indeed. Though ultimately according the Government the relief to which it was entitled, the panel opinion has done so on a basis which permits pretrial disclosure of Government witnesses on unsupported demand by criminal defendants in all but extraordinary cases like this one, and the Government will be required in every case to adduce substantial evidence that its witnesses will be harmed or tampered with before such disclosure may be withheld.

In support of the rule it has announced, the panel cited *no* case providing a principled basis for the panel's conclusions, ignored controlling precedent to the contrary in the Supreme Court and the Courts of Appeals, conferred upon the District Courts a power no law accords them, and utterly disregarded an act of Congress which precludes the District Courts from doing what the panel has said they may and should.

Quite apart from the foregoing, the rule declared by the panel, if permitted to stand, will work incalculable damage to the administration of justice in this Circuit which will be measured not merely in unwarranted acquittals of the guilty but also in the loss of

innocent lives. It will simply not be possible for the Government, under the requirements fixed by the panel, to prevent pretrial discovery of its witnesses in most cases, despite the fact that it is overwhelmingly clear such disclosure will frequently result in the murder or intimidation of persons the law was intended to protect, persons whose mischance it was to be a victim of or witness to a federal offense. This is principally because witness tampering or intimidation, while statistically predictable, is infrequently susceptible of direct proof during the pretrial phase of a criminal proceeding.

While ordinarily it might be appropriate for the Government, victor in name if not in fact before the panel, to await some future case in which to raise the arguments made here, this is not an ordinary case. The opinion of the panel, whether ill-considered, as we respectfully suggest it is, or not, should be reheard because it has substantial impact, already being felt throughout the Circuit, on every pending criminal case, and it will affect every criminal case brought in the future. *Compare United States* v. *Toscanino*, 504 F.2d 1380 (2d Cir. 1974) (Mulligan and Timbers, C.JJ., dissenting from denial of rehearing *in banc*). Moreover, unlike most, the rule announced by the panel is not one of significance merely to judges, lawyers or litigants. Rather, it will have a far broader effect on the administration of justice in this Circuit, both in the danger it will create for innocent individuals who appear as Government witnesses and in the lack of confidence in the courts it will engender in the public at large. The Government rarely petitions for rehearing in this Circuit, still less often do all the United States Attorneys in the Circuit join to express their deep concern about the impact of a ruling in this Court. This case demands rehearing, however, because the rule announced by the panel must be changed now. While the Government technically prevailed before the panel, "[t]he expression by the panel . . ., unreview-

:ble at the instance of the Government since the decision was in its favor, is bound to create chaos in the administration of criminal justice in this circuit. * * * There will be many months of uncertainty before the law in this circuit can be put back where the Supreme Court meant to leave it, as it ultimately will either by this court or by a higher authority. I cannot think of a case more clearly demanding en banc consideration." *United States* v. *Puco*, 476 F.2d 1099, 1111 (2d Cir.) (Friendly, Ch.J., with Hays and Timbers, C.JJ., concurring, dissenting from the denial of reconsideration *in banc*), *cert. denied*, 414 U.S. 844 (1973).

ARGUMENT*

POINT I

The decision of the panel is unsupported by any principled opinion of any federal appellate court and is contrary to settled, valid, and binding precedent.

It was settled at common law in England that an accused was not entitled to pretrial discovery of any sort and could not obtain a list of the Crown's witnesses before trial. VI Wigmore, Evidence §§ 1850 *et seq.* (3d ed. 1940). The only change in English practice before the independence of the United States was the enactment in 1709, during the reign of Queen Anne, of a statute (7 Anne, c. 21, § 11) providing in cases of treason that the accused be furnished before trial with a list of the witnesses to be called by the Crown. *Id.*; see also *Logan* v. *United States*, 144 U.S. 263, 304-308 (1892). In 1790 Congress enacted a similar law based on the English statute providing for pretrial disclosure of Government

* The proceedings in the District Court which led to the order appealed from are set forth in the panel opinion. Slip op. at 54-56.

witnesses in treason cases, 1 Stat. 118, but a defendant, "indicted for any capital offense other than treason, was not entitled to a list of the witnesses." *Logan* v. *United States*, *supra*, 144 U.S. at 304-305. The statutory requirement of pretrial disclosure of the Government's witnesses was subsequently broadened in Section 1033 of the Revised Statutes to include all capital cases. *Id.* That provision, without significant alteration, continues as part of present statutory law. Title 18, United States Code, Section 3432.

It appears to have been settled from the time of independence that in criminal proceedings in the courts of the United States an accused could not obtain pretrial disclosure of the Government's witnesses unless charged with a capital offense that entitled him to such disclosure under the predecessors of what is now 18 U.S.C. § 3432. *United States* v. *Williams*, 28 F. Cas. 646 (No. 16,709) (C.C.D.C. 1804); *United States* v. *Wood*, 28 F. Cas. 754 (No. 16,756) (C.C.E.D. Pa. 1818). In 1877 Chief Justice Waite, riding circuit, rejected a request for pretrial disclosure of the Government's witnesses in a non-capital case on the ground that "there was no practice justifying such a demand." *United States* v. *Butler*, 25 F. Cas. 213, 216 (No. 14,700) (C.C.D.S.C. 1877).* The unavail-

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* An accused could sometimes discover the identity of potential witnesses against him at trial by reason of the practice of endorsing on the indictment the names of the witnesses appearing before the Grand Jury, but that practice, even if required by statute as it was in some jurisdictions, in no way limited the witnesses for the prosecution at trial to those whose names were endorsed on the indictment or required pretrial disclosure of those witnesses to be called whose names did not appear there. *Thiede* v. *Utah Territory*, 159 U.S. 510, 515 (1895). Moreover, the availability of even this haphazard form of pretrial discovery of potential Government witnesses depended on a statute requiring such endorsement and was not available under common law.

[Footnote continued on following page]

ability of pretrial disclosure of Government witnesses in non-capital cases was authoritatively settled by the Supreme Court in *United States* v. *Van Duzee*, 140 U.S. 169, 172-173 (1891). Alluding to the provisions of Section 1033 of the Revised Statutes requiring pretrial disclosure of Government witnesses in capital cases, the Court noted that "there would appear to be a negative pregnant . . ." for non-capital cases and held that in such cases an accused was not entitled to a witness list.*

Although the issue was rarely raised, as might be expected after the Supreme Court had spoken so clearly, the settled rule that the absence of a statute so requiring relieved the Government of any obligation in non-capital cases to disclose its witnesses before trial was uniformly applied by the United States Court of Appeals. *Balliet* v. *United States*, 129 F. 689, 692 (8th Cir. 1904); *Jones* v. *United States*, 162 F. 417, 419-420 (9th Cir.), *cert. denied*, 212 U.S. 576 (1908). In this Circuit, attempts to secure witness lists by demands for particulars were rejected in *United States* v. *Dilliard*, 101 F.2d 829, 835 (2d Cir. 1938), *cert. denied*, 306 U.S. 635 (1939), Judge Learned Hand characterizing such a demand as "wholly unwarranted", and in *United States* v. *Lebron*, 222 F.2d 531, 535-536 (2d Cir.), *cert. denied*, 350 U.S. 876 (1955). A survey of the law in this and other Circuits discloses

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Barrington v. *Missouri*, 205 U.S. 483, 487-488 (1907). There being no such federal statute, such discovery was unavailable in the federal courts. *Clapp* v. *United States*, 18 F.2d 906, 907 (8th Cir.), *cert. denied*, 275 U.S. 548 (1927); *Moore* v. *Aderhold*, 108 F.2d 729, 732 (10th Cir. 1939). *But cf. United States* v. *Southmayd*, 27 F. Cas. 1275 (No. 16,361) (C.C.E.D. Wis. 1875).

* Thus in *Van Duzee* the Supreme Court specifically accepted the argument, rejected by the panel in this case, that the statutory requirement of pretrial disclosure of witnesses in capital cases established that the identity of witnesses was not discoverable in non-capital cases.

that only recently, in a few Circuits, has it been suggested that the District Courts have discretion to require the Government to make pretrial disclosure of its witnesses.

In the District of Columbia Circuit and the Third, Sixth and Tenth Circuits, it remains settled that the Government cannot be required to furnish a list of its witnesses before trial. *United States* v. *Bolden*, 514 F.2d 1301, 1312 (D.C. Cir. 1975); *United States* v. *Addonizio*, 451 F.2d 49, 62 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); *see also Government of Virgin Islands* v. *Ventura*, 476 F.2d 780, 781 n.1 (3d Cir. 1973); *United States* v. *Conder*, 423 F.2d 904, 910 (6th Cir.), *cert. denied*, 400 U.S. 958 (1970); *see also United States* v. *Battisti*, 486 F.2d 961, 965 (6th Cir. 1973); *United States* v. *Pennick*, 500 F.2d 184, 186 (10th Cir.), *cert. denied*, 419 U.S. 1051 (1974); *Carpenter* v. *United States*, 463 F.2d 397, 402 (10th Cir. 1972); *United States* v. *Seasholtz*, 435 F.2d 4, 7 (10th Cir. 1970); *United States* v. *Hughes*, 429 F.2d 1293 (10th Cir. 1970); *Nipp* v. *United States*, 422 F.2d 509, 512 (10th Cir. 1969), *cert. denied*, 399 U.S. 913 (1970); *United States* v. *Eagleston*, 417 F.2d 11, 16 (10th Cir. 1969); *United States* v. *Gleeson*, 411 F.2d 1091, 1094 (10th Cir. 1969); *Thompson* v. *United States*, 381 F.2d 664 (10th Cir. 1967). In *Bolden* the District of Columbia Circuit held: "Since this was not a capital case at the time of trial [citation omitted], there was no government duty to disclose the witness list. *Compare* Fed. R. Crim. P. Rule 16 with Proposed Fed. R. Crim. P. Rule 16(a)(1)(E); *cf.* 18 U.S.C. § 3432 (witness list required in capital case)." In *Addonizio*, relying on 18 U.S.C. § 3432 and this Court's decision in *United States* v. *Persico*, 425 F.2d 1375 (2d Cir.) (Hays, C.J.), *cert. denied*, 400 U.S. 869 (1970), the Third Circuit held that "in no event was the Government required to divulge the identity of its witnesses in a non-capital case." The holding of the Sixth Circuit in *Conder* is accurately described by the panel opinion in this case as "expressly declaring that identity of government witnesses is not

discoverable under Fed. R. Crim. P. 16(b) and strongly implying that courts do not in general have authority to compel disclosure of such information." Slip op. at 57-58 n. 4. The Tenth Circuit has repeatedly held that "there is no requirement that the Government disclose its witnesses in a non-capital case", *Carpenter* v. *United States*, *supra*, 463 F.2d at 402, and that "[i]t is well settled in this Circuit that in non-capital cases an accused is not entitled to be furnished a list of the names of government witnesses", *United States* v. *Gleeson*, *supra*, 411 F.2d at 1094.

Noting *Conder*, but ignoring *Bolden*, *Addonizio* and *Carpenter*, the opinion of the panel in this case finds "wide acknowledgement" for its holding that the district courts have "general discretion . . . to compel the government to identify its witnesses", relying principally on *United States* v. *Jackson*, 508 F.2d 1001 (7th Cir. 1975); *United States* v. *Anderson*, 481 F.2d 685, 693 (4th Cir. 1973), *aff'd*, 417 U.S. 211 (1974); *United States* v. *Cole*, 449 F.2d 194, 198 (8th Cir. 1971), *cert. denied*, 405 U.S. 931 (1972), and *United States* v. *Richter*, 488 F.2d 170, 173-174 (9th Cir. 1973). While the Court's reliance on these cases is not unexpected, an examination of the foundations upon which rest the "holdings" and "recognitions" in those cases of the District Court's discretion to compel pretrial disclosure of the Government's witnesses shows what fragile authority those cases truly are.

The Eighth Circuit, which decided *Cole*, had a line of authority at least as old as *Balliet* v. *United States*, *supra*, decided in 1904, that "[t]here is no provision or requirement that in a non-capital case the government must furnish the defendant with the names of witnesses to be called in behalf of the prosecution. § 3432, Title 18, U.S.C.A. provides for the furnishing of a list of the witnesses in capital cases only." *Dean* v. *United States*, 265 F.2d 544, 547 (8th Cir. 1959). *See also Bohn* v. *United States*, 260 F.2d 773, 778 (8th Cir. 1958), *cert. denied*, 358 U.S. 931 (1959). In *Barnes* v. *United States*, 347

F.2d 925, 929 (8th Cir. 1965), the Court rejected a claim that the trial court had erred in refusing to order the Government to disclose its witnesses, finding no right to such disclosure conferred on the defendants under the Constitution or 18 U.S.C. § 3432 and quoting the passage from *Dean* set out above. The Court went on to say: "It is quite possible that cases may arise where a court in the proper exercise of its discretion should order the Government to disclose the names of its witnesses", but found the case before it not to be among them. No authority of any kind was cited for the proposition quoted.

In *Cole*, the Eighth Circuit relied on *Barnes* and *United States* v. *Harflinger*, 436 F.2d 928 (8th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971), for what the Court in this case calls an "[express recognition of] the district court's general discretion to compel pretrial disclosure of government witnesses." Slip op. at 57 n. 4. But *Barnes*, as noted, contained mere dictum unadorned by any citation of authority, and *Harflinger*, while upholding the denial of a witness list before trial as "certainly within the discretion of the district court", did so because it found "no rule or cases" holding that the Government need disclose its witnesses before trial, and cited cases, including *Dean*, which support the latter proportion and in no way suggest any "general discretion" in the District Court to reach the opposite result. Indeed, *Harflinger* does not even cite *Barnes*. In short, while *Cole* does say that the trial court has discretion to direct pretrial disclosure of the prosecution's witnesses, it does so simply on the basis of a tentative *ipse dixit* unsupported by and inconsistent with the Eighth Circuit's earlier precedent.*

* The vitality of *Cole*, even in the Eighth Circuit, is doubtful. In a subsequent case involving the same defendant that Court sustained the denial of pretrial disclosure of Government witnesses on the ground that "it is well established that the Government is not required in non-capital cases to furnish the names of its witnesses." *United States* v. *Cole*, 453 F.2d 902, 905 (8th Cir.), *cert. denied*, 406 U.S. 922 (1972). The holding in the second *Cole* case was recently relied on by the Eighth Circuit in *United States* v. *Belle*, 516 F.2d 578, 581 (8th Cir. 1975).

The law in the Fourth Circuit is similarly infirm. The panel in this case relied on that Circuit's decision in *United States* v. *Anderson*, *supra*, as "expressly recognizing district court's discretion under Fed. R. Crim. P. 16 to compel pretrial disclosure of identity of government witnesses", slip op. at 57 n. 4, and *Anderson* does say that "[t]he trial court, of course, 'in its discretion may order the government to produce such a list [of its witnesses] under Rule 16, Federal Rules of Criminal Procedure.' *United States* v. *Jordan* (4th Cir. 1972), 466 F.2d 99, 101 [*cert. denied*, 409 U.S. 1129 (1973)]". But in *Jordan* the Fourth Circuit held that the District Court had discretion to order disclosure of the Government's witnesses before trial under Rule 16 on the basis of *United States* v. *Jepson*, 53 F.R.D. 289 (E.D. Wis. 1971), *United States* v. *Leichtfuss*, 331 F. Supp. 723, 732 (N.D. Ill. 1971), and *Will* v. *United States*, 389 U.S. 90 (1967). None of those cases supports the assertion made in *Jordan* in any substantial way. *Jepson* relied simply on the mere "practice of this court to order the production of the *names* of prospective government witnesses immediately before trial." 53 F.R.D. at 291 (emphasis in original). *Leichtfuss* relied on Proposed Rule 16(a)(1)(vi) as originally drafted, see Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 48 F.R.D. 553, 589-590 (1970); its provisions were later revised, and it was promulgated by the Supreme Court as Rule 16(a)(1)(E) but then rejected by Congress.* *Leichtfuss* also relied on *Will* v. *United States*, *supra*, and *United States* v. *White*, 370 F.2d 359 (7th Cir. 1966), cited in *Will*. But *Will*, on which the panel here, slip op. at 57-58 n. 4, and *Anderson*, 481 F.2d at 693 n. 10, also rely, provides no support for the rule announced in those cases.

Will was an application by the Government for a writ of mandamus to a District Judge directing him to vacate his order granting a defense motion for identification of persons to whom the defendant had allegedly made

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* The history of the proposed Rule and the impact of its rejection by Congress are discussed *infra* at 30-32, 40-49.

the false statements underlying the prosecution. The Government contended that the order was improper because its effect was to require disclosure of the Government's witnesses before trial. The Supreme Court's decision to withhold the writ was based principally on the unavailability of the writ as a means of interlocutory appeal by the Government in criminal cases. The Court specifically refused to review the propriety of the order of the District Court, *id.* at 95, noting its agreement with the petitioner that the order "did not call for a list of government witnesses" but merely required disclosure of persons to whom the defendant had made false statements. The Court did say, citing *United States* v. *White*, *supra*, and *United States* v. *Debrow*, 346 U.S. 374, 378 (1953), that the Government could be required to disclose the names of "some" witnesses in a bill of particulars if necessary for the defendant's preparation for trial. However, a reading of the remark in context and of *White* and *Debrow* establishes that the Supreme Court meant no more than that a District Court may order that a defendant be furnished before trial with factual particulars concerning the crime charged—such as the names of the alleged purchasers of narcotics from him, as in *White*—even if it might have the concomitant result of disclosing the identity of Government witnesses. *See* 8 J. Moore, Federal Practice ¶ 16.03[3] n. 22 (1975 rev.). Some Courts have followed this view, *e.g. United States* v. *Addonizio*, *supra*, 451 F.2d at 64 n. 16; *United States* v. *Rimanick*, 422 F.2d 817 (7th Cir. 1970); *United States* v. *Villa*, 370 F. Supp. 515, 520 (D. Conn. 1974); *United States* v. *Palmisano*, 273 F. Supp. 750 (E.D. Pa. 1967), although others, including this Court, have held demands for factual particulars concerning the offense charged to be improper if disclosure of Government witnesses would result. *E.g.*, *United States* v. *Wolfson*, 413 F.2d 804, 808 (2d Cir. 1969); *United States* v. *Boneparth*, 52 F.R.D. 544 (S.D.N.Y. 1971); *United States* v. *Annoreno*, 460 F.2d 1303, 1310 (7th Cir. 1972); *Spinelli* v. *United States*, 382 F.2d 871, 889 (8th Cir. 1967) (*in banc*), *rev'd on*

other grounds, 393 U.S. 410 (1969).* *See generally Rodella* v. *United States*, 286 F.2d 306 (9th Cir. 1960), *cert. denied*, 365 U.S. 889 (1961).

As for the Fifth Circuit, the panel in *Cannone* cites *United States* v. *Fink*, 502 F.2d 1, 6-7 (5th Cir. 1974), *cert. denied*, 421 U.S. 911 (1975), as support for its conclusion that the District Courts have "general discretion . . . to compel the government to identify its witnesses." The citation is substantially wide of the mark. *Fink* involved a refusal by a District Court to order pretrial deposition of prosecution witnesses. The opinion in *Fink*, written by Judge Moore of this Court sitting by designation, sustained the District Court on the authority of *United States* v. *Hancock*, 441 F.2d 1285, 1286-1287 (5th Cir.), *cert. denied*, 404 U.S. 833 (1971), in which the Court of Appeals rejected, for want of authority in the Federal Rules of Criminal Procedure, a claim that the trial judge should have directed the Government to disclose its witnesses so that the defendant depose them. The opinion in *Fink* also cited the Sixth Circuit's opinion in *United States* v. *Conder*, *supra*. That the Court in *Fink* went on to say that discovery generally is within the discretion of the District Court was hardly a holding that District Judges have discretion to order pretrial disclosure of the Government's witnesses. Indeed, the most recent opinion on point in the Fifth Circuit, *United States* v. *Card*, 470 F.2d 144, 145 (5th Cir. 1972), *cert. denied*, 411 U.S. 917 (1973), held flatly, relying on this Court's opinion in *United States* v. *Persico*, *supra*, that "[i]t is well established that in noncapital cases the Government is under no obligation to disclose the names of witnesses", even though there the District Court had ordered it "in its discretion". *Accord*, *United States* v. *White*, 450 F.2d 264, 268 n.6 (5th Cir. 1971), *cert. denied*, 405 U.S. 1072 (1972).

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* The validity and vitality of this decisional rule is not raised by this case. We do not address ourselves to it.

There is a somewhat inconsistent line of cases in the Fifth Circuit, of which *United States* v. *Baggett*, 455 F.2d 476, 477 (5th Cir. 1972), is an example. In *Baggett*, the Court held that for the District Court to deny pretrial disclosure of the Government's witnesses is not an abuse of discretion, citing such cases as *Conder* in the Sixth Circuit and *Seasholtz* in the Tenth, discussed *supra*, which hardly support a notion of discretion. *Baggett* also cites two Fifth Circuit cases, *Downing* v. *United States*, 348 F.2d 594, 599 (5th Cir.), *cert. denied*, 382 U.S. 901 (1965), and *O'Neal* v. *United States*, 411 F.2d 131, 138 (5th Cir.), *cert. denied*, 396 U.S. 827 (1969), which relies exclusively on *Downing*. The relevant portion of *Downing*, 348 F.2d at 599, is as follows:

> "The motion to require the Government to furnish a list of the names and addresses of its witnesses assigned no grounds. It contained no allegations that such a list would be material to the preparation of the defense. When the court called upon Downing's counsel to present the motion, no argument was made and no reasons were given to the court in support of it. Counsel admitted that the granting of the motion was within the discretion of the trial court.[6] There was no abuse of discretion. Rule 16 F. R. Crim. P.; Dean v. United States (8 Cir. 1959) 265 F.2d 544; Yeargain v. United States (9 Cir. 1963) 314 F.2d 881. See also Barron & Holtzoff, Fed. Practice & Procedure (Wright ed.) V.4, § 2032 (Supp. 1964).

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[6] 'THE COURT: All right. What about your motion for a list of witnesses?

'MR. DICKEY: Well, Your Honor, I think that is a discretionary thing with the Court. I filed it, and I have not been furnished a list. I don't think I need to pursue that'."

Thus it is clear that the principal basis for such authority as there is in the Fifth Circuit for the existence of discretion in the District Court to order disclosure of the Government's witnesses before trial is a concession by a defense attorney to a trial judge. The Eighth Circuit's decision in *Dean*, quoted above at page 8, is certainly no support for the proposition for which it is cited in *Downing*, and *Yeargin* v. *United States*, the other decision relied on in *Downing*, holds simply that the function of a bill of particulars is not to provide a defendant with a list of the Government's witnesses.

In the Ninth Circuit, it is, of course, true that *United States* v. *Richter*, *supra*, holds that a trial judge has discretion to order pretrial disclosure of Government witnesses, and that, in contrast to the Eighth Circuit in the first *Cole* case, the Court of Appeals opinion addressed itself to the question directly, eschewing reliance on claimed consistency with precedent actually holding the contrary and careless verbal formulations by judges in earlier cases. However, the correctness of the holding in *Richter* is doubtful because of its furtive departure from settled Ninth Circuit authority to the contrary, its weak doctrinal underpinnings, and the uncertainty of its vitality in the very Circuit in which it was decided.

Like the Eighth Circuit, the Ninth Circuit had a settled rule of considerable antiquity that witness lists were not discoverable before trial in non-capital cases. *Jones* v. *United States*, *supra*. The rule was carried forward by such cases as *Yeargin* v. *United States*, *supra*, and, more recently, *Rosenzweig* v. *United States*, 412 F.2d 844, 845 (9th Cir. 1969), which held that the Government was not required to disclose its witnesses before trial, distinguishing *Will* v. *United States*, *supra*, as "not in point". The same view was reiterated later that year in *United States* v. *Glass*, 421 F.2d 832, 833 (9th Cir. 1969), and again three years later in *United States* v. *Young*, 470

F.2d 963 (9th Cir. 1972), *cert. denied*, 411 U.S. 940 (1973). A year after *Young*, a panel of the Ninth Circuit decided *Richter*, which does not cite a single one of the earlier Ninth Circuit cases on the subject. However, a year after *Richter* the Ninth Circuit, citing *Glass* and ignoring *Richter*, held that there was no requirement that a witness list be furnished before trial in non-capital cases and that a defendant had "no entitlement to such a list prior to trial." *United States* v. *Thompson*, 493 F.2d 305, 309 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974). Later the same year another panel took a middle ground in *United States* v. *Payseur*, 501 F.2d 966, 972-973 (9th Cir. 1974), citing both *Rosenzweig* and *Richter*, and disposing of the case on the basis that no motion for a witness list had been made below.

Quite apart from the uncertain vitality of *Richter* in the very court that decided it, an examination of the underpinnings of the holding in *Richter* establishes the absence of any substantial basis for the conclusion there announced that a district judge has power to order pretrial disclosure of the Government's witnesses. The Court in *Richter* frankly acknowledged that discovery of the Government's witnesses before trial was not authorized by Rule 16 of the Federal Rules of Criminal Procedure or any other. The Court accordingly—and properly—concluded that "the real question is whether there is power, aside from the rules, for the district court to make the order here attacked." 488 F.2d at 173. The Court found such as "inherent power" on the sole basis of this Court's statement in *United States* v. *Baird*, 414 F.2d 700, 710 (2d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970), that "[a] federal district court has the responsibility to supervise the administration of criminal justice in order to ensure fundamental fairness." However, the statement in *Baird* was directed to the power of the District Court to order examination by a psychiatrist retained by the Government of a defendant who *at trial* had raised an

insanity defense he buttressed with the expert testimony of a defense psychiatrist. The "inherent power" of the District Court *at trial* after such a defense is raised is quite a different one from any power to order pretrial disclosure of the Government's witnesses.* The Ninth Circuit's reliance in *Richter* on the principle applied in *Baird* ** is further significantly undermined by the Supreme Court's later decision in *United States* v. *Nobles*, — U.S. —, 43 U.S.L.W. 4815, 4818-4819 (June 23, 1975), which found "inherent power" at trial in a context not dissimilar from that of *Baird* but was at pains to distinguish the District Court's authority at trial from its far more limited powers in pretrial discovery.*** Since

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* A close examination of *Baird* establishes exactly how crucial this distinction is. While Judge Wyatt did grant the Government's application to have Baird examined by the Government's psychiatrist after psychiatric testimony had been adduced by the defense at trial, Judge Wyatt had denied the Government's application for such an examination before trial. 414 F.2d at 705. This Court was at pains to reiterate that the holding in *Baird* was based on "the defendant's election to place in evidence expert opinion testimony, based upon defendant's own statements to the alienist whose qualification to testify rested upon those statements, which were made subsequent to the commission of one of the criminal acts charged . . . ", 414 F.2d at 707, and "that where, under such circumstance the defendant puts in evidence the opinion testimony of his expert, the Government has the right to have its expert examine the accused and to put in evidence his opinion testimony in rebuttal . . . " Id. at 708.

** Interestingly, the passage from *Baird* quoted in *Richter* cites as authority Rule 57(b) of the Federal Criminal Procedure. 414 F.2d at 710. *Richter* stops its quotation before that citation, and earlier in its discussion suggests that authority for the holding in *Richter* does not derive from Rule 57(b).

*** *Baird* also relied gently on *McNabb* v. *United States*, 318 U.S. 332 (1943), in support of the authority exercised by the District Court. However, the "supervisory power" recognized in *McNabb* to exclude tainted evidence at trial cannot be said to extend to the minutiae of pretrial discovery. *See Lopez* v. *United States*, 373 U.S. 427, 440 (1963); *United States* v. *Toscanino*, 500 F.2d 267, 276 (2d Cir. 1974).

general language from *Baird* is the sole basis upon which *Richter* rests, *Richter* can be dismissed as significant authority in support of the decision reached by the panel in this case. Fully applicable in this context is Judge Kaufman's penetrating observation at the beginning of his dissenting opinion in *United States ex rel. Marcelin* v. *Mancusi*, 462 F.2d 36, 46 (2d Cir. 1972), *cert. denied*, 410 U.S. 917 (1973):

> "The majority opinion, it seems to me, falls prey to the pitfalls of rigid adherence to phrases and formulas which seem to gain strength from ritualistic repetition *in haec verba* in case after case. With the most respect for my brothers, I fear the majority opinion chants the teachings of time-worn doctrine of this Circuit, but fails to weigh carefully the appropriateness of borrowing the words for application to this case."

The final string to the panel's bow in this case is the Seventh Circuit's opinion in *United States* v. *Jackson*, 508 F.2d 1001 (7th Cir. 1975), which similarly holds that a District Court has "inherent power" to order pretrial disclosure of witness lists. Like the *Richter* court, the panel in *Jackson* rode roughshod over recent precedents to the contrary in its own Circuit. *See United States* v. *Johnson*, 504 F.2d 622, 628 (7th Cir. 1974); *United States* v. *Verse*, 490 F.2d 280, 281-282 (7th Cir. 1973), *cert. denied*, 416 U.S. 989 (1974); *United States* v. *Annoreno*, *supra*, 460 F.2d at 1310; *United States* v. *Cansler*, 419 F.2d 952, 954 (7th Cir. 1969), *cert. denied*, 397 U.S. 1029 (1970). The *Jackson* panel mentioned only *Verse* as holding disclosure of witnesses unavailable under Rule 16(b) and relied instead on *Richter*, *Jordan* and *Leichtfuss*, all already discussed, and on this Court's opinion in *United States* v. *Baum*, 482 F.2d 1325, 1331 (2d Cir. 1973), discussed *infra* at pages 20-21.

The Court in *Jackson* also suggested that, despite 18 U.S.C. § 3432 and Proposed Rule 16(a)(1)(E), there was a substantial distinction overlooked by the Government "between the right of the defendant to demand a list of witnesses, and the authority of the court to order such disclosure under appropriate circumstances." But this distinction, specifically rejected in *United States* v. *Pennick*, *supra*, 500 F.2d at 186 draws strength only from the negative inferences forced from a clear rule the thrust of which is plainly to the contrary and suggests, albeit in a different guise and location, "the now-discredited right-privilege dichotomy as an analytical approach . . ." *Cardaropoli* v. *Norton*, Dkt. No. 75-2005 (2d Cir., September 29, 1975), slip op. at 83 n. 11. The plain fact of the matter is, whatever the semantic niceties, that the courts which for over one hundred sixty years sustained denials of pretrial disclosure of government witness on the grounds that a defendant was "not entitled" to such disclosure, and that there was "no obligation" on the Government to make it, never once suggested that the denials below were discretionary or that the trial judge could have acted differently had he chosen to. Rather the analysis by the appellate courts, relying principally on the limitation in the grant of authority in 18 U.S.C. § 3432 so casually rejected by the panel in this case, turned not on the question of abuse of discretion but simply on the absence of any right of the defendant to have such discovery or duty on the Government to provide it. Those courts could not have disposed of the contentions before them as they did had proper resolution been perceived to defend on the propriety of the exercise of the District Court's discretion instead of its lack of power to grant the relief demanded below by the defense. It was not until after more than a century and a half of adjudication in criminal proceedings in the courts of the United States that appellate opinions sustaining denials of witness lists were occasionally cast in terms of the exercise of discretion of the District Court, rather than the

want of any right of the defendant, and from this simple, unreasoned and apparently careless * change in language upholding denials below,** some courts, like the panel in this case, have found the existence of a discretion to grant pretrial disclosure of the Government's witnesses. We respectfully submit that as substantial a change in the law as has been made by the panel cannot depend on as little as this.

Last, and most important, is, of course, the condition of the law in this Circuit.*** The law seemed settled by *Dilliard*, *Lebron* and, in 1969, by *Wolfson*, and, in any event, was settled by Judge Hays, writing for the court in *United States* v. *Persico*, *supra*, 425 F.2d at 1378. In *Persico* the appellants complained of the Government's

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* Carelessness appears to be a frequent source of procedural "innovation" in the area of criminal discovery. Here the order to disclose witnesses was apparently entered by mistake. Slip. op. at 55 & n. 2.

** A reading of the few recent cases which have sustained the denial of pretrial disclosure of prosecution witnesses on the basis of the District Court's discretion suggests that claims of this sort were resolved upon such an analysis on appeal because they had been cast below in terms of demand for a bill of particulars, a matter traditionally within the trial court's discretion. *E.g.*, *United States* v. *Cohen*, 518 F.2d 727, 734 (2d Cir. 1975).

*** The panel opinion in this case failed to note the only relevant case from the First Circuit, *United States* v. *Murphy*, 480 F.2d 256, 259 (1st Cir.), *cert. denied*, 414 U.S. 912 (1973), which seems to take a middle ground:

> "First, with regard to defendant's request for disclosure of the government's trial witnesses, since criminal defendants are ordinarily not entitled to this information, *see* United States v. Glass, 421 F.2d 832, 833 (9th Cir. 1969), and cases cited, it is settled that this motion was addressed to the discretion of the trial court. Given the simple nature of the underlying factual situation in the instant case and the fact that three of the government's four witnesses were named in the indictment, this discretion was not abused in the denial of this motion."

failure to advise them of its intention to call the notorious Joseph Valachi to the stand. This Court responded simply:

> "There is no obligation on the part of the government to inform the defense of its intention to call a witness when the indictment is for a non-capital offense. See 18 U.S.C. § 3432 (1964); United States v. Van Duzee, 140 U.S. 169, 173, 11 S.Ct. 758, 35 L.Ed. 399 (1891); Thompson v. United States, 381 F.2d 664, 665-666 (10th Cir. 1967); United States v. Chase, 372 F.2d 453, 466 (4th Cir.), cert. denied, 387 U.S. 907, 87 S.Ct. 1688, 18 L.Ed. 2d 626 (1967); Dean v. United States, 265 F.2d 544, 547 (8th Cir. 1959)."

See also United States v. *Mavrogiorgis*, 49 F.R.D. 214 (S.D.N.Y. 1969) (Mansfield, J.).

However, in *United States* v. *Baum*, *supra*, 482 F.2d at 1331-1332 & n. 3, this Court threw over settled precedent and announced in a footnote, relying on no decisional authority but principally on Proposed Rule 16(a)(1)(vi), that "prevailing concepts of criminal justice" require pretrial disclosure of Government witnesses. *Baum* distinguished *Persico* on the sole ground that the witness whose identity was not disclosed in *Baum*, one Greenhalgh, was in federal custody at the time of trial, and that thus "[t]here were no valid considerations to justify the concealment of Greenhalgh's identity as a prospective witness, as in *United States* v. *Persico*. . . ." 482 F.2d at 1331. How the Court in *Baum* could have taken this distinction is not at all clear, since the newspaper articles, reprinted in *Persico*, 425 F.2d at 1379 n.6, that resulted from the announcement of Valachi's appearance disclosed that " 'Valachi has been brought from the maximum security of the federal prison in Milan, Mich., and is under tight guard in the U. S. Courthouse in Brooklyn. Only federal marshals are permitted near him.' " What seems clear is

that the *Baum* court sought to justify the perceived need for reversal, arising from Baum's deprivation of a brief continuance to meet the evidence of an allegedly unexpected "similar acts" witness, not by criticizing the trial judge for denying the continuance but rather by excoriating the prosecutor for dereliction of what had never been his duty before, despite the fact that the trial judge had denied pretrial disclosure of the Government's witnesses. While there was no hint of criticism in the *Baum* opinion of the trial judge's refusal to grant Baum any sort of continuance after Greenhalgh testified, a subsequent gloss on *Baum* by a member of the *Baum* panel suggests that at least part of the unspoken basis for reversal there was that the "trial court . . . had refused any continuance at all when [Greenhalgh] was called." *United States* v. *Leonard*, Dkt. No. 75-1153 (2d Cir., August 28, 1975), slip op. at 5868.

More important, the reversal in *Baum* was unquestionably made without regard for existing precedent in either this Circuit or the Supreme Court and was posited entirely on the Court's view of "prevailing concepts of criminal justice", Proposed Rule 16(a)(1)(vi), without taking due account that these concepts were not at that time law, and that, as the Court could not then know, they would be rejected by Congress, which, with the Supreme Court and the President, had the authority as a matter of law (18 U.S.C. § 3771) to determine what concepts would in fact prevail. *See generally United States* v. *Dockery*, 447 F.2d 1178, 1185-1186 (D.C. Cir.), *cert. denied*, 404 U.S. 950 (1971). *Cf. United States* v. *Percevault*, 490 F.2d 126, 130 n.9 (2d Cir. 1974).

The net of this excursion into the prior decisions of the federal courts is that:

> First, the right to discovery of the Government's witnesses before trial did not exist at common law;
> Second, that to the extent that such a right has

been specifically conferred, it has existed only in capital cases and has been provided only by statute;*

Third, every reported decision of the Supreme Court and Courts of Appeals from the time of independence until 1965 was uniform in holding that a defendant could not obtain a list of the Government's witnesses before trial in a non-capital case;

Fourth, those courts that have held that a district judge may require pretrial disclosure of the Government's witnesses have been unable to provide a valid foundation for their conclusions and, indeed, cannot even agree on the basis for the power: The Fourth Circuit in *Anderson* and *Jordan* held that witness lists are discoverable under Rule 16(b), while the Ninth Circuit in *Richter* and the Seventh in *Jackson* specifically held that this was not the case, preferring instead to rely on an "inherent power" of the District Court in such matters, and this Court's opinions in *Baum* and this case appear to express a similar view. However, as will be demonstrated in the next section, the District Courts have no power to permit such discovery.

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* Indeed, in those state jurisdictions in which the right to pretrial disclosure of the prosecution witnesses has been established in non-capital cases, it has been done by statute. See Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 48 F.R.D. 553, 603-604 (1970).

POINT II

The District Courts have no power to order pretrial disclosure of the Government's witnesses at trial.

The foregoing analysis of the decisional law concerning pretrial disclosure of witnesses to be called by the Government at trial of non-capital cases establishes that the "inherent power" found by some courts to authorize District Courts to compel such disclosure is one of quite recent recognition by those courts that credit its existence. While the disagreement as to its source that the panel recognizes between the courts that claim its existence itself strongly suggests that those courts are wrong, a further examination appears appropriate to determine whether there is any authority—whether in the Constitution, the United States Code, the Federal Rules of Criminal Procedure, or otherwise—that confers such a power on a District Court. For purposes of the rule announced in this case, it is clear that there is not.

The absence of any valid basis in decisional precedent for an "inherent power" outside the Federal Rules of Criminal Procedure to order disclosure of Government witnesses has been discussed in Point I. The principal question that remains is whether any provision of the Federal Rules of Criminal Procedure confers power on a District Court to require the Government to disclose its witnesses before trial in a non-capital case.

It appears to be settled, although *Anderson* and *Jordan* in the Fourth Circuit are to the contrary, that Rule 16 in its present form does not confer such power on the District Courts. *Richter* and, by clear inference, *Jackson* so hold, and the reliance in this case on the language in *Baird*, and in *Baum* on Proposed Rule 16(a)

(1) (vi), makes clear that this Court is of a similar view. The only other potential source in the Rules for such authority is Rule 57(b):

> "Procedure Not Otherwise Specified.
>
> If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

The Ninth Circuit's opinion in *Richter*, 488 F.2d at 173 n. 7, suggests that the powers conferred under Rule 57(b) were not intended to be applied to compel discovery of the Government's witnesses before trial, and the Seventh Circuit appeared to share this view in *Jackson*, 508 F.2d 1006 n.5. The Ninth Circuit's view seems to have been adopted implicitly by this Circuit in both *Baum* and this case, since neither cited Rule 57(b) as a source of authority.

The inapplicability of Rule 57(b) of the Federal Rules of Criminal Procedure as a source for a power to require pretrial disclosure of Government witnesses is even more apparent if the exercise of power under similar provisions in the other Rules of Procedure for the District Courts is examined. The exercise of power under Rule 83 of the Federal Rules of Civil Procedure, which has a similar provision, has never gone beyond the "housekeeping" regulations that *Richter* suggests, 488 F.2d at 173 n. 7, Rule 57(b) of the Criminal Rules authorizes. *See* 7 J. Moore, Federal Practice ¶ 83.03 & n. 17 (2d ed. 1974). More significantly, a similar provision in the General Admiralty Rules once claimed as the source of power for an innovation in discovery not provided by those Rules was held by the Supreme Court not to authorize such discovery. *Miner* v. *Atlass*, 363 U.S. 641 (1960). That decision, we submit, is controlling in this case as well.

In *Miner* the District Court for the Northern District of Illinois had, by local rule, authorized the taking of depositions for discovery in admiralty cases. There was no provision for such discovery in the General Admiralty Rules promulgated by the Supreme Court. The Supreme Court found no historical inherent power in the District Courts to order such discovery, despite "the traditionally flexible and adaptable admiralty practice", and dismissed an argument "that history disclosed no overt rejection of the power to order [such] deposition . . ." by pointing out that "[t]here is no affirmative indication of the exercise of such a power, if any was thought to exist . . ." *Id.* at 643-644.

After rejecting a further argument implying a right to this specific form of discovery from the provision in the General Admiralty Rules penalizing refusals generally to make discovery, the Court turned to the claim that despite the absence of a provision for such discovery in the General Admiralty Rules, the rule adopted by the District Court was a valid exercise of power under Rule 44 of the General Admiralty Rules.* While assuming *arguendo* that the traditional flexibility of the admiralty jurisdiction and the broad language of Rule 44 could be read to authorize the discovery allowed in the Northern District of Illinois, the Court held such discovery to be "not consistent with the present General Admiralty Rules." *Id.* at 647. In support of its conclusion, the Court pointed out that not all discovery devices available in other civil cases had been incorporated in the General Admiralty Rules, *id.* at 648, although many of them had. *Id.* at 644 & n. 3. While recognizing that the failure to include authorization for such discovery in the General

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* "In suits in admiralty in all cases not provided for by these rules or by statute, the district courts are to regulate their practice in such a manner as they deem most expedient for the due administration of justice, provided the same are not inconsistent with these rules."

Admiralty Rules could quite logically be argued to imply "no more than that this Court did not wish *to impose* the practice on the District Courts, and does not necessarily bespeak an intention to foreclose a 'local option' under Rule 44", the Court found compelling reasons why Rule 44 could not be applied to authorize discovery not specifically proved for by the General Admiralty Rules:

> "We deal here only with the procedure before us, and our decision is based on its particular nature and history. Discovery by deposition is at once more weighty and more complex a matter than either of the examples just discussed or others that might come to mind. Its introduction into federal procedure was one of the major achievements of the Civil Rules, and has been described by this Court as 'one of the most significant innovations' of the rules. *Hickman* v. *Taylor*, 329 U.S. 495, 500. Moreover, the choice of procedures adopted to govern various specific problems arising under the system was in some instances hardly less significant than the initial decision to have such a system. It should be obvious that we are not here dealing either with a bare choice between an affirmative or a negative answer to a narrow question, or even less with the necessary choice of a rule to deal with a problem which must have an answer, but need not have any particular one. Rather, the matter is one which, though concededly 'procedural,' may be of as great importance to litigants as many a 'substantial' doctrine, and which arises in a field of federal jurisdiction where nationwide uniformity has traditionally always been highly esteemed.
>
> The problem then is one which peculiarly calls for exacting observance of the statutory procedures surrounding the rule-making powers of the

> Court, see 28 U.S.C. § 331 (advisory function of Judicial Conference), 28 U.S.C. § 2073 (prior report of proposed rule to Congress), designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords. Having already concluded that the discovery-deposition procedure is not authorized by the General Admiralty Rules themselves, we should hesitate to construe General Rule 44 as permitting a change so basic as to be effectuated through the local rule-making power, especially when that course was never reported to Congress [footnote omitted] as would now be required under 28 U.S.C. § 2073." *Id.* at 649-650.*

As the Seventh Circuit in Jackson, *supra*, 508 F.2d at 1007, pointed out, *Miner* v. *Atlas* did deal with a specific problem arising within the context of the Admiralty Rules. However, we submit that that is hardly a distinction which entitles the teachings of the Supreme Court in so analagous a context to be dismissed out of hand as they were in *Jackson*. The principal impact of

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* The Court concluded by noting, *id.* at 650-651, that it was "sharply reinforced in our conclusion" by the fact that proposals to include in the General Admiralty Rules the discovery device adopted by the District Court had been made but not carried out. In Point III of this petition, we deal with the effect of Congress' recent deletion of Rule 16(a)(1)(E) from the amended Federal Rules of Criminal Procedure promulgated by the Supreme Court in 1974. That Rule, as noted *infra*, would have provided, under certain safeguards, for pretrial disclosure of witnesses. While we submit in Point III that the Congressional deletion of Rule 16 (a)(1)(E) precludes as a matter of law what the panel in this case authorized District Courts to do, the deletion of Rule 16 (a)(1)(E) and the necessity perceived by the Advisory Committee to propose such a specific provision on the point in the first place are of obvious relevance here as well.

Miner here is its clear statement that significant discovery devices not specifically provided for by rules of procedure promulgated by the Supreme Court should not be authorized by lower courts under such provisions as Rule 57(b) of the Criminal Rules.* Moreover, while in *Miner* the Court necessarily focused on the history and provisions of the Admiralty Rules to reach the result that it did, examination of the history of pretrial discovery in criminal cases compels *a fortiori* here the result the Supreme Court reached in *Miner*.

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* Other cases in the Supreme Court concerning the powers of the District Court in procedural matters not governed by statute or rule are not inconsistent with *Miner* or its applicability here.

In *Link* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962), the Court held that the power of the District Courts to dismiss civil cases for want of prosecution or their own motion could "not be seriously doubted", given ancient precedent and current usage. The contrary implication of Rule 41(b) of the Federal Rules of Civil Procedure, authorizing dismissal of such cases on motion of the defendant, was held insufficient to support an assumption that the Rule "was intended to abrogate so well-acknowledged a proposition." *Id.* at 632.

In *Harris* v. *Nelson*, 394 U.S. 286 (1969), discovery devices not authorized by rule were approved for use when necessary in habeas corpus proceedings because of the unique significance of such proceedings in the federal system, the high obligations and commensurate powers of the District Courts in discharging their duties upon applications for the Writ, the absence of any rules at all on the subject, and the broad grant of statutory authority in such cases to "dispose of the matter as law and justice require." 28 U.S.C. § 2243.

Finally, in *Colgrove* v. *Battin*, 413 U.S. 149 (1973), the Court upheld a rule of the District Court for Montana authorizing six man juries in civil cases against a claim that the Seventh Amendment required a jury of twelve. The Court disposed of an implication in Rule 48 of the Federal Rules of Civil Procedure that twelve jurors were required by holding that the Rule was premised on the draftmen's erroneous assumption, exposed in *Colgrove*, that the Seventh Amendment made twelve jurors necessary. *Miner* was specifically distinguished, 413 U.S. at 163-164 n. 23, on the ground that the District Court rule neither conflicted with Rule 48 nor announced " 'a basic procedural innovation' " as the District Court rule in *Miner* had.

As earlier noted, there was no discovery in criminal cases at common law. It was likewise held in the United States that pretrial discovery was unavailable to defendants in federal criminal cases until the promulgation of the Federal Rules of Criminal Procedure. *United States* v. *Rosenfeld*, 57 F.2d 74 (2d Cir.), *cert. denied*, 286 U.S. 556 (1932); *Shores* v. *United States*, 174 F.2d 838, 843 (8th Cir. 1949); *United States* v. *Brown*, 501 F.2d 146, 155 (9th Cir. 1974), *rev'd on other grounds as United States* v. *Nobles*, *supra*. When Rule 16 of the Federal Rules of Criminal Procedure, the only one of the Rules of Criminal Procedure dealing with pretrial discovery, was originally promulgated in 1946, it authorized the District Court in its discretion to allow a defendant to discover only physical objects and documents belonging to him or obtained by the Government from the defendant or from others by means of seizure or process. See 5 F.R.D. 589. The Advisory Committee Note to Rule 16 made clear that for the most part this provision was breaking new ground, adding that "[w]hether under existing law discovery may be permitted in criminal cases is doubtful . . ." 8 J. Moore, Federal Practice ¶ 16.01[2] (1975 rev.). That pretrial discovery in criminal cases, even to this limited extent, was an innovation was plainly understood, *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 218-219 (1951); Yankwich, Concealment or Revealment? Comments on Rules 18, 19 and 20, Federal Rules of Criminal Procedure Preliminary Draft, 3 F.R.D. 209, 214-216 (1943), and it is clear that the draftsmen believed that Rule 16 limned the boundaries on the District Court's discovery powers, Holtzoff, Codification of Federal Criminal Procedure, 4 F.R.D. 275, 281 (1944). The articles by Judges Yankwich and Holtzoff, the latter then Secretary of the Advisory Committee, are also instructive in their references to Rule 16 in its earlier incarnations as Rule 19 and 18 in the Preliminary and Second Preliminary Drafts of the Federal Rules of Crim-

inal Procedure, respectively. Significantly, Rule 16 as promulgated was substantially more restrictive than Rule 19 in the Preliminary Draft, which would have allowed the discovery of all documents and tangible objects "not privileged".

Rule 16 continued unchanged from 1946 until 1966. In 1962 it was proposed to delete as unnecessarily restrictive the limitation that the documents and objects that might be inspected have been obtained by seizure or process; Rule 16 was also to be broadened to allow discovery of the defendant's statements and the results of scientific tests. Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, 31 F.R.D. 665, 675-676 (1962). The Second Preliminary Draft broadened the proposed amendments to Rule 16 further to include discovery of the defendant's Grand Jury testimony, and Rule 16 as thus amended was adopted in 1966 in the form which continues in force at the present time. Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the District Courts, 34 F.R.D. 411, 421-426 (1964). The Advisory Committee Note to the 1964 proposed amendments later substantially adopted made clear that the "rule has been revised to expand the scope of pretrial dicovery." See also Amendments to Rules of Criminal Procedure, 39 F.R.D. 69, 173-178 (1966). That these changes in Rule 16 were innovations, and "certain to produce sharp debate", as Professor Wright put it when the Second Preliminary Draft was published in 1964, Wright, Proposed Changes in Federal Civil, Criminal and Appellate Procedure, 35 F.R.D. 317, 327 (1964), is obvious. *See also United States* v. *Percevault, supra,* 490 F.2d at 129 & n. 7.

Finally, in 1970 further changes were proposed in Rule 16, including a provision (Rule 16(a)(1)(vi)) giving the District Court discretion to permit a defendant to discover before trial the names and addresses of wit-

nesses to be called by the Government at trial, though such disclosure was barred upon a certification by the prosecutor "that to do so may subject the witness or others to physical or substantial economic harm or coercion"; the proposed rule also permitted perpetuation of a witness's testimony for use at trial if the result of disclosure was that "the witness has become unavailable . . . or changed his testimony." Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts, 48 F.R.D. 553, 587, 589-590 (1970). The Advisory Committee Note, 48 F.R.D. 595, 603-606, specifically stated that the provision allowing pretrial discovery of Government witnesses "is new" and relied exclusively on state statutes with supposedly analogous provisions * as authority for the proposed rule. No suggestion was made that an existing or "inherent" power of the District Court was being codified, and no decision implying existing discretion in the District Courts to require disclosure was cited, although by 1970 there were a few.

The Rule, as Rule 16(a)(1)(E), was reported to Congress on April 22, 1974, by the Chief Justice. While the Rule as reported was accompanied by substantially the same Advisory Committee note, Rule 16(a)(1)(E) differed from Proposed Rule 16(a)(1)(vi) in its requirement of disclosure of the witnesses to be called at trial by the Government on demand by the defense instead of on order of the District Court. No certification provision was included as in the first version, although a similar perpetuation right was provided, and in cases in which danger to the witnesses was feared or other reason existed to defer or foreclose such discovery, resort to the provision for protective orders (Rule 16(d)(1))

* The greater number of statutes in the Note are miscited, providing as they do merely for disclosure of witnesses before the Grand Jury.

was apparently required.* What happened in Congress is discussed in Point III, *infra*.

The net of this examination of the creation and extension of pretrial discovery in criminal cases under Rule 16 makes clear the applicability of the doctrine announced in *Miner* v. *Atlass* to the attempt to provide pretrial discovery of Government witnesses by judicial fiat in this and other such cases. Discovery in criminal cases did not exist before Rule 16 was promulgated in 1946 and then only in a form which was more restrictive not only than the discovery provisions then part of the Federal Rules of Civil Procedure but also than its counterpart in the Preliminary Draft of the Criminal Rules. Far from being silent, the Federal Rules of Criminal Procedure have from their beginning concerned themselves directly with the availability of pretrial discovery, which has heretofore been exclusively governed by the provisions of Rule 16 in its various forms. Each change in Rule 16 has always been the subject of substantial controversy, and the Advisory Committee and other commentators have been unanimous, with each change, that new ground was being broken. The proposal in 1970 that the District Courts be empowered to order discovery of the Government's witnesses before trial was specifically said to be "new" by the Advisory Committee, which in its Note never even hinted that District Courts then had any such power in non-capital cases. The fact that such a proposal was made is itself substantial authority for

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* The reason for the changes in the Rule are not explained. The second paragraph of the Advisory Committee Note to Rule 16 as reported to Congress, 62 F.R.D. at 307, 308, was not in the Note to the 1970 Preliminary Draft. It suggests that the change in language was "to make clear that discovery should be accomplished by the parties themselves, without the necessity of a court order unless there is dispute as to whether the matter is discoverable . . ." This is obviously an incomplete explanation.

the view that, absent an authorizing provision in the Rules, the Government's witnesses are not discoverable before trial. *See United States* v. *Feinberg*, 502 F.2d 1180, 1182 (7th Cir. 1974).* That the expansions of criminal discovery by the amendments to Rule 16 have been viewed as innovations, rather than codifications of existing authority and practice, is additional evidence that there is no "inherent power" in the lower courts to extend as they choose criminal discovery beyond the provisions of Rule 16. The rule announced by the panel in this case is wrong both because it exceeds what the Rule 16 provides for and because it trenches on the authority of the Supreme Court, which alone within the judicial branch has the power, within the statutory framework provided, to deal with a subject matter of this importance to the federal criminal justice system.

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* The panel rejects the argument that "the fact these amendments were initially proposed indicates that the district court at that point did not have the authority to compel disclosure of the identity of government witnesses" by the rejoinder that "the contemporaneous opinions of the sponsors of these proposed amendments are not legally determinative of the present power of district courts." Slip op. at 59. *But see United States* v. *Baum*, *supra*. However, the fact the sponsors included the Advisory Committee on the Federal Rules of Criminal Procedure, the Judicial Conference of the United States, and the Justices of the Supreme Court entitles the sponsors' views to substantially more attention than the panel gave them; indeed, one might have supposed that the likelihood that these "sponsors" knew whereof they spoke would have checked the panel in its progress towards the contrary conclusion. Moreover, the panel's treatment of the weight to be accorded the views of the sponsors of ameliorative legislation on the state of existing law seems entirely inconsistent with existing precedent in this Circuit. *See, e.g., United States* v. *Fein*, 504 F.2d 1170, 1178, 1179-1180 (2d Cir. 1974), in which the legislation proposed by the Justice Department and enacted by Congress to extend the life of the Watergate grand jury beyond eighteen months was viewed as substantial authority for the proposition that existing law did not allow such an extention of analogous grand juries.

Decisions which have dealt with other procedural devices not authorized by an applicable provision in the Federal Rules of Criminal Procedure nor expressly forbidden by it have similarly concluded that generally a power not expressly conferred by the governing rule may not be exercised. *United States* v. *Weinstein*, 511 F.2d 622 (2d Cir. 1975); *United States* v. *Percevault*, *supra*, 490 F.2d at 129-131; *United States* v. *Weinstein*, 452 F.2d 704 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972); *United States* v. *Dooling*, 406 F.2d 192 (2d Cir.), *cert. denied*, 395 U.S. 911 (1969); *United States* v. *Vanterpool*, 377 F.2d 32 (2d Cir. 1967); *see also United States* v. *Wright*, 489 F.2d 1181, 1188-1192 (D.C. Cir. 1973); *United States* v. *McCracken*, 488 F.2d 406, 418-419 (5th Cir. 1974); *United States* v. *Whitted*, 454 F.2d 642 (8th Cir. 1972); *United States* v. *Hancock*, *supra*; *United States* v. *Gray*, 438 F.2d 1160 (9th Cir. 1971); *United States* v. *Spock*, 416 F.2d 165, 180 (1st Cir. 1969); *Gray* v. *United States*, 174 F.2d 919, 923-924 (8th Cir.), *cert. denied*, 338 U.S. 848 (1949).* *Cf. United States* v. *Smith*, 331 U.S. 469 (1947); *United States* v. *Williams*, 502 F.2d 581, 584 (8th Cir. 1974). *But see United States* v. *Nolte*, 39 F.R.D. 359 (N.D. Cal. 1965); *United States* v. *Taylor*, 25 F.R.D. 225 (E.D.N.Y. 1960). As the Court said in *Gray*, 174 F.2d at 924: "It is not the function of the courts subordinate to the Supreme Court to introduce innovations of criminal procedure." *See also United States* v. *Dockery*, *supra*, 447 F.2d at 1185-1186; *United States* v. *Tallman*, 437 F.2d 1103 (7th Cir. 1971).

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* *McCracken*, *Spock* and *Gray* v. *United States* all dealt with the impropriety of taking special verdicts in a criminal case. Each case cited found error in taking such verdicts, relying principally on the want of authorization to do so in the Federal Rules of Criminal Procedure. *Accord*, *United States* v. *Adcock*, 447 F.2d 1337, 1339 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971). Interestingly, however, at common law special verdicts were "not unknown" in criminal cases. *United States* v. *Noble*, 155 F.2d 315, 317 n. 4 (3d Cir. 1946).

In *Weinstein*, *supra*, 452 F.2d 704, the District Court dismissed an indictment after the entry of a judgment of conviction because, on its assessment of the credibility of the Government's proof, neither the conviction nor a new trial was in the interest of justice. The District Court conceded, and this Court on the Government's application for mandamus agreed, that "no rule gives the judge an overriding power to terminate a criminal prosecution in which the Government's evidence has passed the test of legal sufficiency simply because he thinks that course would be most consonant with the interests of justice." 452 F.2d at 714-715. Judge Friendly continued, *id.* at 715 & n. 15, applying principles which we submit are as controlling here as they were in *Weinstein*:

> "We believe the failure of the Rules to bestow such a power precludes its exercise. The Federal Rules of Criminal Procedure were designed to provide a uniform set of procedures to govern criminal cases within the federal courts consistent with the requirements of justice and sound administration. Where previously recognized powers were thought appropriate for inclusion in the rules, this was expressly done. Most relevant for our purposes, the three rules providing for termination of a prosecution once a jury has been impaneled [15] are all embodiments of such powers: Rule 29 is an expression of the common law power to acquit for insufficiency of the evidence; Rule 34, arrest of judgment, has recently been interpreted as exactly carrying forward its common law predecessor, United States v. Sisson, supra; and Rule 48(b), dismissal by the court for unnecessary delay, was said by the Advisory Committee to be 'a restatement of the inherent power of the court to dismiss a case for want of prosecution,' see also United States v. Research Foundation, Inc., 155 F. Supp.

650 (S.D.N.Y. 1957). Moreover, the authority for the Criminal Rules, now 18 U.S.C. § 3771, specifically provides that 'All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.' Thus, even if some other source had given a judge authorization to terminate a prosecution on the basis here suggested, this would be terminated in an area which the Rules have occupied to such an extent as here. If the interests of justice would be served by bestowing so broad a power as that here invoked, a matter on which reasonable minds may differ, see 8 Moore, Federal Practice (Cipes) ¶ 29.05 at 29-13, the Supreme Court's power to amend the Rules is adequate to that end."

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[15] Rule 12, dealing with pre-trial motions, was the subject of great debate in United States v. Mersky, 361 U.S. 431, 80 S.Ct. 459, 4 L.Ed.2d 423 (1960). There, Mr. Justice Brennan in his concurring opinion, 361 U.S. at 441, 80 S.Ct. 459, 4 L.Ed.2d 423, and Mr. Justice Stewart in his dissent, 361 U.S. at 453, 80 S.Ct. 459, 4 L.Ed.2d 423, joined issue on the effect of Rule 12 on the historic 'motion in bar.' Mr. Justice Brennan argued that Rule 12 swept away the common law motion in bar in favor of a broader rule. Mr. Justice Stewart argued that Rule 12 merely carried forward the existing federal law relating to a motion in bar which itself was somewhat broader than its common law predecessor. But both Justices focused on what they found to be the proper interpretation of the Rule, and neither recognized any inherent power to go beyond whatever the proper interpretation was found to be." *

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* Judge Friendly then concluded by pointing out the absence of precedent for any such inherent power. As to pretrial discovery of the identity of Government witnesses, the same is true. See Point I, *supra*.

While the scope of each of the Rules of Criminal Procedure, its history and the powers of the District Court before its existence may leave room for argument that in a given case the provisions of a particular Rule are not exclusive, it seems clear that, at least where, as here, there was no power in the District Courts at all before the Rules, the Rules circumscribe the power of the District Court at the same time as they confer it. While there may be "inherent power" in a District Court *at trial* under certain limited circumstances, *United States* v. *Nobles, supra; United States* v. *Baird, supra*, those cases, as noted *supra*, have no relevance here.

The absence of authority under either historical "inherent power" of the District Court * or the Rules of Criminal Procedure to order pre-trial disclosure of Government witnesses brings the inquiry almost to an end. The only statute directly applicable is 18 U.S.C. § 3432, which by its terms allows pretrial disclosure of Government witnesses only in capital cases.**

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* Judge Friendly's analysis in *Weinstein* strongly suggests that even if "inherent power" to permit discovery of the Government's witnesses existed prior to the promulgation of the Rules, the absence of such authorization in the Rules would likely mean that such a power no longer exists. *See also United States* v. *Noble, supra*. *Cf. Dutton* v. *Evans*, 400 U.S. 74, 82 (1970).

** The panel in this case brushed aside as "dubious" the Government's argument that the Jencks Act (18 U.S.C. § 3500) suggested "Congress' intent that district courts not have discretion to compel the pretrial disclosure of the *names* of government witnesses", adding that "[i]ronically, however, application here of the maxim *inclusio unius est exclusio alterius*, implicitly invoked by the government in its first argument, supports the argument that Congress elected not to restrict the courts' power to compel pretrial disclosure of the identity of government witnesses (in non-capital cases)." Slip op. at 58-59 (emphasis in original). While the Jencks Act may not, by its precise terms, be conclusive on the lack of power of the district courts to order pretrial disclosure of the identity of witnesses to be called by the Government at trial, it is also equally clear that the Jencks Act

[Footnote continued on following page]

The final possible source for authority to require pretrial disclosure of Government witnesses is the Constitution. Nearly twenty years ago, when Rule 16 did not authorize a defendant to discover his own statements, Judge Kaufman expressed the view that, whatever the restrictions of Rule 16,

> "suffice it to say that there are situations where discovery of the defendant's statement would be demanded under the aegis provided defendant by the fifth amendment. Such a situation might occur where psychiatric examinations of defendant before trial are indispensable to the adequate preparation of a defense of insanity, or where defendant is seeking exclusion of the statement by challenging its authenticity." [footnote omitted].

Kaufman, Criminal Discovery and Inspection of the Defendant's Own Statements in The Federal Courts, 57 Colum. L. Rev. 1113, 1120-1121 (1957).* A few years

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cannot be read as restrictively as the panel did here, *Palermo* v. *United States*, 360 U.S. 343, 349-351 (1959), and that one of the purposes of that Act in prohibiting pretrial disclosure of statements of Government witnesses was to protect them by concealing their identity before they testified. *United States* v. *Feinberg*, *supra*, 502 F.2d at 1182; *United States* v. *Dorfman*, 53 F.R.D. 477, 479 (S.D.N.Y. 1971) (Gurfein, J.), *aff'd*, 470 F.2d 246 (2d Cir. 1972), *cert. dism.*, 411 U.S. 923 (1973). *Cf. United States* v. *Percevault*, *supra*, 490 F.2d at 131. That Congress did not in the Jencks Act specifically prohibit pretrial disclosure of the identity of Government witnesses was presumably because of its perfectly correct understanding of one hundred fifty years of settled judicial precedent that a defendant could not obtain such discovery in a noncapital case. *See Farmer* v. *Arabian American Oil Company*, 324 F.2d 359, 365, 367 (2d Cir. 1963) (*in banc*; dissenting opinion of Smith, Clark and Hays, C.JJ.), *rev'd*, 379 U.S. 227 (1964).

* In *United States* v. *Jordan*, *supra*, 466 F.2d at 101, the Fourth Circuit expressed the view that ignorance of the Government's witnesses before trial might under unspecified circumstances affront the confrontation clause of the Sixth Amendment. *But see United States ex rel. Meadows* v. *New York*, 426 F.2d 1176, 1184 (2d Cir. 1970), *cert. denied*, 401 U.S. 941 (1971).

thereafter this Court concluded that under existing law a defendant was not entitled to pretrial discovery of his prior statements. *United States* v. *Murray*, 297 F.2d 812, 819-821 (2d Cir.), *cert. denied*, 369 U.S. 823 (1962). Citing Judge Kaufman's article, the Court said, "We cannot say that there may never be a situation where it would be appropriate to allow a defendant to examine his own statement before trial" and, referring to Judge Kaufman's conclusion that under such circumstances courts have "inherent authority" to require such disclosure, concluded: "We need not consider whether such power exists, since the facts of this case fall far short of showing any earlier need for the statements." *Id.* at 821-822 & n. 7.

We respectfully suggest that what differences there may be between the views expressed in Judge Kaufman's article and *Murray* are unnecessary to resolve in this case. If the want of pretrial disclosure of a specific witness' identity could ever generate a claim of constitutional dimensions, then the duty of a court under the Constitution might give rise to a power to fashion a remedy commensurate with the right otherwise denied. However, it seems clear that the power thus created would be limited to the circumstances from which it arose, and that no such power could authorize the broad rule announced by the panel here. *Cf. Singer* v. *United States*, 380 U.S. 24, 36-38 (1965).

In short, except in a truly extraordinary case in which the Constitution may require and empower a court to act, the absence of a grant of authority in the Federal Rules of Criminal Procedure to require disclosure of the Government's witnesses before trial plainly precludes the exercise of such a power by a District Court. The fact that the Rules do not expressly forbid the exercise of such a power, if true,* does not entitle the Court to usurp a power not

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* This question is considered in Point III, *infra*.

conferred upon it. The implication of the contrary view—that the judges are free to exercise powers not theirs so long as not specifically forbidden to do so—does no credit to the judicial process and, in our view, too easily ignores the rights of collegiate and independent branches of the Government and of the Supreme Court.

POINT III

The action of Congress in deleting proposed Rule 16(a)(1)(E) precludes the District Courts from directing pretrial disclosure of Government witness in non-capital cases.

While the foregoing establishes an absence of power in the District Courts to order pretrial disclosure of Government witnesses at trial, we respectfully submit that, whether or not such a power heretofore existed, the action of Congress and the President in July, 1975, in deleting Proposed Rule 16(a)(1)(E) from the amendments to the Federal Rules of Criminal Procedure reported by the Chief Justice in April, 1974, precludes the District Courts from ordering pretrial disclosure of Government witnesses in non-capital cases.

Congress' action on Proposed Rule 16(a)(1)(E)* began with the enactment on July 30, 1974 of Public Law 93-361, 88 Stat. 397, which delayed until August 1, 1975, the effective date of the Rules transmitted by the Supreme Court in April, 1974. The principal reason for the delay was to permit Congressional consideration of the objections raised by prosecutors and defense attorneys to Rules 16(a)(1)(E) and (b)(1)(C), which for the first

* The history of Proposed Rule 16(a)(1)(E) from its initial proposal in different form as Rule 16(a)(1)(vi) to its transmission to Congress in April, 1974, is set forth above, at pp. 30-32.

time permitted pretrial discovery by the party opponent of the identity of witnesses to be called at trial.

The new rules were first scrutinized in detail by the House Judiciary Committee, which on May 20, 1975, after hearings, reported out a bill (H.R. 6799), amending, among other things, the witness disclosure provisions of Rule 16 to limit the time for disclosure of the identity of Government witnesses to three days before trial; an additional amendment in the bill to Rule 16(d)(1) provided that the District Court might order earlier disclosure or deny or defer any sort of discovery available under Rule 16. H.R. Rep. 94-247, 94th Cong., 1st Sess. (1975), 1975 U.S. Code Cong. and Ad. News 1358, 1369-1371, 1385-1386. Of the thirty-one members of the Committee who voted on H.R. 6799, fourteen Congressmen opposed the provision for pretrial disclosure of Government witnesses, even as limited in the bill from the earlier, broader version promulgated by the Supreme Court. *Id.* at 1375, 1396-1397.

On the House floor, an amendment to delete Rule 16(a)(1)(E) so as to preclude pretrial discovery of Government witnesses was narrowly defeated on June 18, 1975, by a vote of 216 to 199, 18 members not voting. 121 Cong. Rec. H. 5650-5658. H.R. 6799 was subsequently passed by the House on June 23, 1975.

In the Senate, H.R. 6799 was referred to the Senate Committee on the Judiciary, which also held hearings on the bill. On July 17, 1975, on the Senate floor, Senator McClellan proposed on behalf of the Committee an amendment to the bill which, among other things, deleted Rule 16(a)(1)(E). 121 Cong. Rec. S 12871 *et seq.* Senator McClellan supported that part of the amendment by pointing out that the Rule changed existing law, that present discovery under the Rules was more than

fair to defendants, that the danger posed to witnesses by pretrial disclosure of their identity was amply documented, and that the 3-day limitation in H.R. 6799 was "no more than a 'paper' safeguard." He also noted that the natural reluctance of members of the public to appear as prosecution witnesses would quite understandably be considerably increased by Rule 16(a)(1)(E). *Id.* at S 12876-12877. The Senate passed the proposed amendment to H.R. 6799 and, as amended, the bill itself.

Because of the differences between the Senate and House version of the bill, the matter was referred to a conference committee of the House and Senate, which adopted the Senate's deletion of Rule 16(a)(1)(E). The Joint Statement of the Committee recites that the Senate version so adopted "eliminates these provisions [Rules 16(a)(1)(E) and (b)(1)(C)], *thereby making the names and addresses of a party's witnesses nondiscoverable.*" House Conf. Rep. No. 94-414, 94th Cong., 1st Sess. (1975), 1975 U.S. Code Cong. and Ad. News 1397, 1400 (emphasis supplied). The Statement continues:

> "A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy." *Id.*

The bill agreed to by the Conference was adopted in the House and Senate on July 30, 1975, 121 Cong. Rec. H.

7859 *et seq.*, S 14300 *et seq.*,* and was signed by the President the next day. Pub. Law 94-64, 89 Stat. 370.

The panel opinion in this case deals with the action of Congress in deleting Rule 16(a)(1)(E) in an entirely unrealistic fashion. Focusing exclusively on the statement in the conference report that "'[a] majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or defendant [sic] be forced to reveal the names and addresses of its witnesses before trial'", the panel concludes that the conference report "appears to express a desire that courts not be *required* to force disclosure of the identity of government witnesses, not a desire that courts not have the discretionary power to force such disclosure." Slip op. at 60-61 (emphasis in original). The Court's reliance on the single sentence of the conference report it chooses to fasten on is entirely misconceived. The Conference quite clearly was formulating legislation the purpose of which was to delimit the scope and exercise of the power of the District Courts with regard to pretrial disclosure of wit-

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* In support of the deletion of Rule 16(a)(1)(E) by the Conference, Senator McClellan said in part:

> "Although it should be obvious, I want to emphasize that the policy choice was directly presented and positively resolved in favor of affording all possible protection and encouragement to witnesses in Federal criminal cases. This includes the ability of the prosecutor to assure a reluctant or fearful witness that his identity will not be divulged to the defendant prior to appearance at trial. Although there may be unusual cases involving fundamental fairness, the congressional decision on this issue should be taken as clear disapproval of the exercise of so-called inherent power by the courts to fashion local rules or individual orders calling for discovery of witnesses, see, for example, *United States* v. *Jackson*, 508 F.2d 1001, 1006 (7th Cir. 1975) and cases cited therein, except insofar as such discovery may be required to effectuate a party's right to constitutional due process of law." 121 Cong. Rec. at S 14301.

nesses. Rule 16 as proposed by the Supreme Court and as embodied in the legislation passed by the House and rejected by the Senate did give the courts discretion under Rule 16(d) to control discovery under Rule 16(a)(1)(E), although the exercise of that discretion was generally to be triggered by the party opposing discovery rather than the party seeking it. Most important, the Conference report specifically says, although the Court ignores it, that the Senate version adopted by the Conference "mak[es] the names and addresses of a party's witnesses nondiscoverable", hardly an offer of discretionary power to the District Courts to do precisely what the Congress found inimical to the interest of justice.* Indeed, if there were any doubt over the plain meaning of the Conference report, any examination of the statements of Senator McClellan, who sponsored the legislation which is now the law in the words he proposed, makes abundantly clear that it was the intention of the Congress to preclude pretrial disclosure of Government witnesses in non-capital cases; the panel opinion does not appear to contend the contrary seriously. Slip op. at 60. Finally, had Congress intended that the District Courts have discretionary power to require pretrial disclosure of Government witnesses in noncapital cases, it presumably knew well enough how to modify the rule to provide for it.**

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* Representative William L. Hungate, who chaired the subcommittee of the House Committee on the Judiciary which held hearings on the proposed amendments, and who was a strong supporter of the House version of Rule 16(a)(1)(E), has recently written that one of the effects of the modifications in the Supreme Court's version of Rule 16 wrought by Public Law 94-64 is that "the names and addresses of witnesses are not subject to discovery." Hungate, Changes in the Federal Rules of Criminal Procedure, 61 A.B.A.J. 1203, 1204 (October, 1975).

** Quite apart from the fact that Congress plainly intended by its deletion of Rule 16(a)(1)(E) that there should be no pretrial disclosure of Government witnesses, the rule enunciated by the

[Footnote continued on following page]

The principal point, however, is not just what Congress thought but also what it did and the framework in which it acted. The panel in this case disposes of the Government's argument that "Congress deletion of Proposed Rule 16(a)(1)(E) . . . buttresses the government's contention that district courts do not have authority to compel pretrial disclosure of the identity of its witnesses" by the rejoinder that "[o]nce again, the government appears to manifest the belief that the current opinions of Congress are in some way determinative of the legal power of the federal courts" and by the subtle expression of doubt that Congress has "the power under the Constitution to restrict the courts' authority to require pretrial disclosure of government witnesses . . " Slip op. at 60. The Court, we respectfully submit, seriously erred both in its suggestion that Congress' exercise of *its* power to foreclose the District Courts from ordering pretrial disclosure of Government witnesses was not "determinative", for that is the nature of the power expressly reserved to Congress by 18 U.S.C. § 3771, and in its intimation that for Congress to purport to exercise such power

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panel in this case is inconsistent with the intent of Congress even as the panel perceives it. While characterizing and distinguishing Rule 16(a)(1)(E) as providing for "a general *right* to discovery of government witnesses on the part of defendants, not discretionary judicial power to compel such discovery", slip op. at 59, the panel goes on to formulate a rule for the exercise of that discretion "that, once the defense moves for disclosure of the identity of the government's witnesses, the government bears the burden of making a prima facie showing that such disclosure would not be in the best interests of justice", and that no showing of materiality or reasonableness need be made by the defendant for such disclosure since that is *prima facie* obvious and up to the government to negate. Slip op. at 63-65. We respectfully suggest that having distinguished the Rule 16(a)(1)(E) on the ground that it proposed to confer a "general right to discovery", the Court has announced a rule which differs from that rejected by Congress only in the absence of the safeguard, such as it was, for the perpetuation by deposition of the testimony of witnesses so disclosed.

might not be constitutional. *Palermo* v. *United States*, 360 U.S. 343, 353-354 n. 11 (1959).*

Section 3771 of Title 18 authorizes the Supreme Court to promulgate rules governing procedure in criminal cases in the United States District Courts. This enabling statute makes specific provision for the proposed rules to be reported to Congress by the Chief Justice and for a delay in the effectiveness of the Rules adopted by the Supreme Court to provide time for Congress to modify them if it chooses. *See United States* v. *Fein, supra*, 504 F.2d at 1178 n. 9. The significance of the latter provisions to the entire framework of the adoption of rules of procedure for the District Courts was made abundantly clear by the Supreme Court long ago in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 14-16 (1941), in discussing the effect of the same provision in the enabling statute for the promulgation of the Federal Rules of Civil Procedure:

> "Finally, it is urged that Rules 35 and 37 work a major change of policy and that this was not intended by Congress. * * * [I]n accordance with the Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature.
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> The value of the reservation of power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make

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* Not only is *Palermo* conclusive of the constitutionality of enactments of this sort by Congress, it is well to note that the constitutional objection that has been raised to the framework created by the enabling statutes is that it transfers to the Supreme Court powers properly exercised under the Constitution only by Congress and the President. Amendments to the Rules of Civil Procedure for the United States District Courts, 374 U.S. 861, 865-866 (1963) (Dissenting statement of Mr. Justice Black and Mr. Justice Douglas).

> sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was attacked and defended before the committees of the two Houses. * * * That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found." (footnotes omitted).

See also Miner v. *Atlass*, *supra*, 363 U.S. at 650. The significance of the Congressional role in the promulgation of Rules of Criminal Procedure for the District Courts has been emphasized time and again by the Supreme Court, *e.g.*, *Singer* v. *United States*, *supra*, 380 U.S. at 37; *Davis* v. *United States*, 411 U.S. 233, 241-242 (1973), and by this Court, *e.g.*, *United States* v. *Furey*, 514 F.2d 1098, 1104-1105 (2d Cir. 1975).

Here the Congress exercised its powers under Section 3771 to delete proposed Rule 16(a)(1)(E) from the amendments to the Federal Rules of Criminal Procedure reported to it by the Chief Justice in 1974. The deletion is specifically included in the statute enacting the amendments to the Rules as modified and approved by Congress. Public Law 94-64, § 3, ¶ 23. The legislative history of the Act makes clear beyond any doubt whatsoever that Congress intended by its deletion of Rule 16(a)(1)(E) that the District Courts be foreclosed from granting pretrial discovery of the identity of witnesses to be called by the Government at trial of a non-capital offense. That Congress did not *in haec verba* forbid the exercise of a power which it chose not to grant the District Courts cannot make any difference, given what Congress did and why. *See Palermo* v. *United States*, *supra*, 360 U.S. at 349-351; *United States* v. *Robinson*, 361 U.S. 220, 227-228 (1960). If the role which is reserved to Congress under Section

3771 is to have any meaning at all, then the action Congress took with respect to Rule 16(a)(1)(E) must be respected by the courts, and the attempt by the panel to overrule Congress must be set right.* Judge Taylor's observations in denying analogous relief in *United States* v. *Isaacs*, 351 F. Supp. 1323, 1328 (N.D. Ill. 1972), *aff'd*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974), are fully apposite here:

> "The movement sponsored by many able judges and law professors for the further liberalization of the discovery rules has not been overlooked. This trend, however, is not sufficient to justify the Court in ignoring an act of Congress."

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* The panel opinion appears to put weight on the point that the amendments provided in Public Law 94-64 do not, by the terms of the Act, take effect until December 1, 1975. The Court apparently meant, although it did not say so, that the deletion by Congress of Rule 16(a)(1)(E) will have no effect until December 1, 1975. Whatever the merits of this view on a technical basis, the Government's arguments in this petition in no way stand or fall on it, see Points I and II, *supra*, and it seems entirely clear that Congress did not intend by delaying the effectiveness of the amendments to the Rules that the District Courts might permit pretrial discovery of Government witnesses until Decmber 1, 1975. Moreover, since this Court in *Baum* thought it entirely proper to apply Rule 16(a)(1)(vi) when proposed by the Advisory Committee, long before Rule 16(a)(1)(E) was adopted by the Supreme Court, it seems hardly inappropriate to suggest that the determinative action taken by Congress and the President should be given the same sort of immediate effect.

POINT IV

Even assuming that the District Courts have the power to require pretrial disclosure of the witnesses the Government intends to call at trial, the rule for exercise of that power declared by the panel must be entirely changed.

Even if it be assumed that the District Courts have the power to require that the Government inform the defense before trial of the identity of its witnesses, the rule announced by the panel to govern that exercise is entirely unresponsive to the dangers of pretrial disclosure of witnesses. The panel's rule imposes no burden on the defendant to establish any need for pretrial discovery of the witnesses to be called by the Government, and it requires the Government to do what will be impossible in all but a few cases—to make a substantial showing that pretrial disclosure of the Government's witnesses will result in tampering or intimidation. If any pretrial disclosure of Government witnesses is to be allowed, the burden must be on the defendant to show both an extraordinary need for such discovery *and* that such discovery will not endanger the witnesses whose names he seeks. If that seems a heavy burden, it is because it should be.

Those commentators who favor pretrial disclosure of Government witnesses appear to view, in varying degrees, the danger of witness tampering and intimidation as a figment of the imagination of prosecutors whose bloodthirstiness impels them to oppose any procedural advancement in the criminal process which may work in favor of the defense. This view is utterly wrong. Witness tampering and intimidation are a commonplace, even without pretrial discovery of Government witnesses. The evidence of this was sufficient to induce the House of Representatives to ring Rule 16(a)(1)(E) with safeguards, albeit

inadequate. The evidence of witness tampering and intimidation presented to the Senate * was sufficient to compel that body to delete Rule 16(a)(1)(E) entirely. It is not necessary, however, for this Court to read the legislative hearings surrounding Rule 16(a)(1)(E) to learn this. Rather, it is sufficient that the Court consult its own cases for the proof that witness tampering and murder are already far too frequent in the districts in this Circuit. A sampling of such cases in the last two years alone follows:

United States v. *Lubrano*, Dkt. No. 75-1158 (2d Cir., argued September 26, 1975): informant who was to be crucial government witness murdered before trial.

United States v. *Harvey*, Dkt. No. 75-1053 (2d Cir., argued August 13, 1975): two individuals convicted of killing a fifteen year old accomplice to prevent him from testifying against them with respect to several federal charges involving transportation of dynamite and conspiracy.

United States v. *Fayer*, Dkt. No. 75-1147 (2d Cir., September 24, 1975): attorney representing targets in FHA bribery investigation attempted to induce FHA appraiser they had bribed not to testify before the Grand Jury.

United States v. *Jordan*, Dkt. No. 75-1040 (2d Cir., August 26, 1975): witness who was the girlfriend of one of the defendants in a bank robbery prosecution and who had furnished incriminating information about him to the local police, FBI and Grand Jury, at trial denied her earlier statements and claimed that her Grand Jury testimony was the product of threats by the police and FBI.

* The catalogue submitted by the Justice Department citing specific incidents by district fills 33 pages of small print in the printed transcripts of the Senate hearings. Hearings on the Federal Rules of Criminal Procedure Amendments Before the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 176-209 (June 20, 1975).

United States v. *Pacelli*, 521 F.2d 135 (2d Cir. 1975): defendant murdered a young woman and burned her body in order to prevent her from testifying against him at his trial for narcotics offenses.*

United States v. *Frank*, 520 F.2d 1287, 1291 (2d Cir. 1975): attorney charged with securities fraud attempted to obtain from his co-defendant a perjured affidavit exonerating him.

United States v. *Brasco*, 516 F.2d 816 (2d Cir.), *cert. denied*, — U.S. —, 44 U.S.L.W. 3204 (October 6, 1975): incarcerated immunized Government witness who had testified at a first trial refused to testify at a second trial on the stated ground that it would adversely affect his wife's "health".

United States v. *Turcotte*, 515 F.2d 145 (2d Cir. 1975): targets in a sports bribery investigation attempted to suborn false testimony before a Grand Jury by a potential witness against them.

United States v. *Gerry*, 515 F.2d 130, 139-141 (2d Cir.), *cert. denied*, — U.S. —, 44 U.S.L.W. 3201 (October 6, 1975): numerous Government witnesses recanted prior trial or grand jury testimony in sports bribery prosecution arising out of the investigation in *Turcotte*.

United States v. *Rivera*, 513 F.2d 519, 525-528 (2d Cir. 1975): prosecution witness in murder case recanted grand jury testimony, claiming it to be the product of threats by agents, after he and his wife had been threatened to prevent him from testifying.

* At Pacelli's narcotics trial another young woman with whom Pacelli had dealt in narcotics repudiated her prior statements and claimed not even to know Pacelli. *See United States* v. *Pacelli*, 470 F.2d 67, 69 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973).

United States v. *Malizia*, 503 F.2d 578, 580-581 (2d Cir. 1974), *cert. denied*, 420 U.S. 912 (1975): informant refused to testify in a narcotics prosecution because of his "'fear of being killed.'"

United States v. *Cioffi*, 493 F.2d 1111 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974): defendant in extortion prosecution attempted to silence or suborn victim of extortion who was a government witness.

United States v. *D'Amato*, 493 F.2d 359, 361 n.1 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974): lower echelon narcotics dealer found beaten and shot to death ten days after his arrest; he had agreed to cooperate with the Government.

United States v. *Sclafani*, 487 F.2d 245, 249 (2d Cir.), *cert. denied*, 414 U.S. 1023 (1973): attempt by defendants indicted for extortion to intimidate the victim witnesses against them.

United States v. *Marrapese*, 486 F.2d 918, 920 & n.1 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974): the principal witness against the defendants, an informant who had participated in their attempts to sell stolen machine guns, was murdered shortly before trial.

United States v. *Rosner*, 485 F.2d 1213, 1218 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974): an attorney and a private investigator attempted to learn the whereabouts of George Stewart, a government witness whom the attorney had previously represented, so that they could have him murdered.*

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* Stewart was a crucial witness in *United States* v. *Bynum*, 485 F.2d 490, 493-495 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974). The defendants in *Bynum* had themselves, prior to their arrests, almost succeeded in their

[Footnote continued on following page]

This list by no means includes all of the cases before this Court in the last two years in which witness tampering or intimidation has been in the record. It is also not fully representative of the problems of witness tampering and intimidation because it reflects only some of the cases which have reached the appellate level *despite* the best efforts of the defendants involved. It cannot begin to reflect the measure of prosecutions lost or never brought because of interference with Government witnesses.

It may well be asked, given the mayhem and tampering that goes on without judicially compelled pretrial disclosure of Government witnesses, why such disclosure is likely to make matters perceptibly worse. To this there are several answers. First, knowledge that pretrial disclosure of witness is a routine part of the criminal process will significantly heighten the already ingrained reluctance of most members of the public to furnish information to law enforcement authorities. Second, the witness tampering and intimidation that have occurred have involved witnesses of whose identity the defendant independently was aware. If there is general pretrial disclosure of Government witnesses, defendants will almost always learn of the identities of witnesses not previously known to them. Moreover, defendants will almost always know of some potential witnesses against them but not whether they are known to the Government and may be unwilling to engage in witness tampering absent the

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plan to murder Robert Wollack, a New York City police officer and drug dealer whom they suspected of informing the authorities of their activities. *Id.* at 495. Ironically, Wollack was no stranger to such plots, for when a member of his narcotics gang was arrested a few months prior to the attempt on Wollack's life, Wollack took him to the offices of some attorneys, with whom they discussed whether they had been betrayed by an informant whom they ought to kill. *United States* v. *Wollack*, 486 F.2d 1398 (2d Cir. 1972) (order without opinion).

certainty and focus arising from formal identification of its witnesses by the Government.*

In addition, while any witness who testifies for the Government in a criminal case runs the risk that he will be subjected to mistreatment after trial at the hands of the defendant or his friends, the rewards received by a defendant from such violent conduct tend to be limited to the satisfaction of revenge. While this inducement has not infrequently been sufficient to stimulate some defendants to act, the fact remains that the wholesale disclosure of prosecution witnesses before trial provides a far more compelling temptation than revenge to the unscrupulous defendant and the potential of far greater gain.

Apart from increasing existing dangers to Government witnesses by allowing discovery of their identities and addresses under any circumstances, the panel, while paying lipservice to the idea that protective orders should be available where the danger is apparent, has framed a rule requiring witness disclosure on unsupported demand by the defendant, with the burden on the Government to make a substantial showing that to allow such disclosure will cause harm to its witnesses. Some measure of the showing the panel intends is disclosed by its analysis in this case, for, while concluding that a Grand Jury's finding of the defendants' obstruction of justice "by beating a Grand Jury witness" was a sufficient basis for reversal, for want of "meaningful explanation", of the District Court's order of disclosure, resting as it did

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* A good example of this appears from the opinion in *United States* v. *Pacelli, supra,* 521 F.2d 135. While Pacelli may well have been aware that Patsy Parks could give harmful testimony against him, there was no evidence that he made any attempts to suborn or injure her until he learned from her through Lipsky that the Government was attempting to subpoena her for his trial. Hours later she was dead.

solely on the Judge's "inadvertence", slip op. at 55 & n. 2, 60, the panel left open the possibility that the District Court might properly direct disclosure anyway provided a rational basis for doing so was spread in the record. The stringency of this requirement is substantially greater than required by the decisions of this Court in analogous contexts trenching significantly on a defendant's constitutional rights. *See, e.g., United States ex rel. Lloyd* v. *Vincent*, 520 F.2d 1272 (2d Cir. 1975) (Hays, *C.J.*); *United States* v. *Bell*, 464 F.2d 667, 669-672 (2d Cir.), *cert, denied*, 409 U.S. 991 (1972). Moreover, the fact is that it will be a rare case in which the Government will be able to oppose an application for discovery of its witnesses with the strength of a Grand Jury's finding that witness intimidation has already occurred. Even more important, while witness tampering is a statistical reality, it is not usually an objectively demonstrable one within the confines of pretrial proceedings in a particular prosecution. For example, while the Court now knows that Vincent Pacelli was a very substantial narcotics trafficker, *see United States* v. *Mallah*, 503 F.2d 971, 981-987 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975), at the time that Pacelli murdered Patsy Parks, the only charge upon which he had ever been arrested was the one at the trial of which Parks was to testify. Moreover, it is certainly fair to conclude that had the Government foreseen any of the mayhem or tampering that is chronicled in the cases cited above—even on a far less certain basis than would foreclose an order to disclose Government witnesses under the rule announced in this case—it would have taken steps to prevent it. However, the response of a particular defendant facing imprisonment to the catalytic knowledge of the identity of the witnesses against him will vary as much as human experience and moral control under stress differ between one individual and another. The vice of the rule announced by the panel is that the potentiality of harm to Government witnesses is simply unpredictable on a case by case basis, absent

any history of such specific conduct on the part of the particular defendant involved. The net of the matter is that, if the panel rule is allowed to stand, a certain number of Government witnesses will die in this Circuit every year. Nothing in the panel's opinion suggests any good reason why this should be so, nor why Congress' judgment on just this point should not be followed, whether or not it is controlling as a matter of law.

We submit that, if pretrial disclosure of the Government's witnesses is ever to be allowed, it should only occur in cases in which the defendant can establish with substantial evidence his specific pressing need for such information pretrial and a certainty that this information will not be misused. While this may seem restrictive, there is simply no basis to conclude that criminal prosecutions as presently conducted are unfair because an accused may lack knowledge, until trial, of the names and addresses of the witnesses against him, or that the legitimate benefits to be derived from such disclosure outweigh the potential dangers. The rule announced by the panel is far more likely to lead to unjust judgments. *See United States* v. *Louis Carreau, Inc.*, 42 F.R.D. 408, 413-415 (S.D.N.Y. 1967), (Mansfield, *J.*).

CONCLUSION

The opinion of the panel in this case should be modified to reverse the order below on the ground that the District Court acted outside its authority, or, at the very least, granted a motion upon which a wholly insufficient showing had been made by the defense.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

John D. Gordan, III, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 10th day of November, 1975, he served 2 copies of the within ~~brief~~ petition by placing the same in a properly postpaid franked envelope addressed:

Daniel M. Scaccia, Esq.
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And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John D. Gordan III

Sworn to before me this

10th day of November 1975.

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977